

**ORAL ARGUMENT SCHEDULED FOR MAY 16, 2025
NOS. 25-5037, 25-5055, 25-5057**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CATHY A. HARRIS, IN HER PERSONAL CAPACITY AND IN HER
OFFICIAL CAPACITY AS MEMBER OF THE MERIT SYSTEMS
PROTECTION BOARD,

Plaintiff-Appellee,

v.

SCOTT BESENT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE
TREASURY, *et al.*,

Defendants-Appellants.

GWYNNE A. WILCOX,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE
UNITED STATES, *et al.*,

Defendants-Appellants.

On appeal from the United States District Court
for the District of Columbia

**BRIEF OF 253 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN
SUPPORT OF APPELLEES AND AFFIRMANCE**

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *Amici Curiae* represents that counsel for all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *Amici* certifies that a separate brief is necessary. *Amici* are 253 elected Members of Congress, who have a strong interest in defending Congress's authority to enact removal protections for the boards and commissions of independent agencies like the National Labor Relations Board and Merit Systems Protection Board. As Members of Congress, *Amici* provide distinct expertise regarding the history of Congress's reliance on this authority since the Constitution's adoption to empower independent agencies to fulfill their statutory charges.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and *Amici Curiae*

Except for *Amici Curiae* and any other *amici* who had not yet entered an appearance in this case to date, all parties, intervenors, and *amici* appearing in this Court are listed in Appellants' opening brief and Appellee Gwynne A. Wilcox's brief.

II. Rulings Under Review

References to the rulings under review appear in Appellants' opening brief.

III. Related Cases

References to any related cases pending before this Court appear in Appellants' opening brief, Appellee Cathy A. Harris's brief, and Appellee Gwynne A. Wilcox's brief.

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GLOSSARY

FTC	Federal Trade Commission
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board

INTEREST OF AMICI CURIAE¹

Amici Curiae are 253 Members of Congress, who share the Court’s interest in preserving the separation of powers. They have a strong interest in defending Congress’s authority to enact the removal protections for the boards of the National Labor Relations Board (“NLRB”), Merit Systems Protection Board (“MSPB”), and the over thirty other multimember independent agencies created by Congress. *Amici* include Members of Congress who serve or have served on committees with jurisdiction over the independent agencies that Congress created to address crises and issues impacting the American public and whose board members Appellants contend the President may remove without cause despite—and, in fact, directly contrary to—protections passed by Congress. *Amici* are familiar with the essential role that independent leadership plays in empowering these agencies to execute their missions. In particular, *Amici* have a critical interest in the continued existence and effective functioning of the NLRB and MSPB, whose independence Congress relies on to impartially resolve labor disputes; preserve the professional, non-partisan, merit-based federal workforce; and defend the rights of federal workers and whistleblowers.

¹ Pursuant to D.C. Circuit Rule 29(a)(4)(E), counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici* or its counsel made a monetary contribution to this brief. The Parties have consented to the filing of this brief.

A full list of *Amici* appears at the end of this brief.

SUMMARY OF ARGUMENT

Since the Constitution’s adoption, Congress has exercised its constitutional authority to structure federal agencies and create multimember agencies whose board members are protected from removal without cause. This balance enables Congress to provide those agencies with a measure of independence while preserving the President’s authority to remove board members who fail to faithfully execute the laws. Throughout the nation’s history, Congress, the Executive, and the Supreme Court have all agreed that Congress possesses this authority—until President Donald Trump attempted to dismiss Appellee Gwynne Wilcox from the NLRB and Appellee Cathy Harris from the MSPB without cause.

The President’s actions contradict longstanding historical practice and Supreme Court precedent, which have repeatedly affirmed Congress’s authority to create multimember independent agencies. In 1935, the Supreme Court approved the multimember structure of the Federal Trade Commission (“FTC”) in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) and upheld Congress’s authority to enact removal protections for agency boards and commissions. During the ninety years that followed, the Court has repeatedly approved similar structures and removal protections, and Congress has relied upon that approval, creating over thirty multimember agencies, including the NLRB and the MSPB, based on that

model. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020) (affirming the legitimacy of “multimember expert agencies that do not wield substantial executive power”); *Collins v. Yellen*, 594 U.S. 220, 250-51 (2021) (confirming the Court did not revisit *Humphrey’s Executor* in *Seila*).

Appellants would have this Court ignore or invalidate this binding precedent in order to profoundly expand the President’s authority and allow him to fire members of independent boards and commissions at will. This radical position contradicts the express understanding of all three Branches over almost a century and would disrupt the foundation of almost three dozen federal agencies. No sufficient justification exists for upsetting such deeply embedded precedent.

ARGUMENT

The Supreme Court places “great weight” on “[l]ong settled and established practice” in separation-of-powers cases, *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (quoting *Okanogan v. United States*, 279 U.S. 655, 689 (1929)), because ““traditional ways of conducting government . . . give meaning’ to the Constitution.” *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). And “practice” remains “an important interpretive factor.” *Noel Canning*, 573 U.S. at 525 (collecting cases); *see also Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015).

The Constitution vests Congress with the authority to create and structure multimember independent agencies to address “the various *crises* of human affairs.” *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis in original). This includes Congress’s “broad” authority to “create” governmental “office[s]” and “commission[s].” *Buckley v. Valeo*, 424 U.S. 1, 134 (1976), *superseded by statute on other grounds, Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, 116 Stat. 81 (2002).

Since 1789, Congress has exercised this authority to create boards and commissions whose members are removable only for cause in order to give those members the independence required to perform their duties while respecting the President’s authority to remove members who fail to faithfully execute the laws. More than two centuries of practice by Congress pursuant to the above-described framework affirm this authority. No legally relevant reason exists to discontinue it now.

I. All Three Branches Have Long Recognized that Congress Can Create Multimember Independent Agencies.

An unbroken line of historical practice and Supreme Court precedent evinces the recognition by Congress, the Supreme Court, and the Executive that the Constitution grants Congress the authority to create multimember independent agencies with for-cause removal protections.

A. Throughout Its History, Congress Has Exercised Its Authority to Protect Members of Independent Agency Boards and Commissions from At-Will Removal.

Since the Constitution’s adoption, Congress has exercised its power to condition the President’s removal authority, including when creating and structuring independent agencies. In 1789, Congress retained for-cause removal protections for territorial judges when it reenacted the Northwest Ordinance and transferred removal authority over territorial officials to the President. *An Act to Provide for the Government of the Territory Northwest of the River Ohio*, ch. 8, § 1, 1 Stat. 50, 51, 53 (1789). A year later, Congress ensured that the President had no authority to remove two of the five directors of the Federal Reserve’s predecessor, the Sinking Fund Commission. *An Act Making Provision for the Reduction of the Public Debt*, ch. 47, § 2, 1 Stat. 186 (1790). And the following year, Congress protected all members of the First Bank of the United States from removal by the President for any cause. *An Act to Incorporate the Subscribers to the Bank of the United States*, ch. 10, § 4, 1 Stat. 191, 192-193 (1791). Congress affirmed that protection in 1816, when it created the Second Bank of the United States and granted the President authority to remove only five of the twenty-five members of the Second Bank. *An Act to Incorporate the Subscribers to the Bank of the United States*, ch. 44, § 8, 3 Stat. 266, 269 (1816).

After the Civil War, Congress relied on the multimember independent agency model to address new crises and issues arising in a modernizing America.

In 1887, Congress created the Interstate Commerce Commission to check the “growing power of the railroads over the American economy.” *Seila*, 591 U.S. at 275 (Kagan, J., dissenting in part and concurring in part); *Interstate Commerce Act*, Pub. L. No. 49-41, ch. 104, § 11, 24 Stat. 379, 383 (1887). Congress sought to preserve the Commission’s independence by providing that only three of the five members could be “appointed from the same political party” and that the President could remove its commissioners only for “inefficiency, neglect of duty, or malfeasance.” *Id.*

Wary of bestowing power to “unskilled or selfish hands,” Congress again relied on the multimember independent agency model in 1913 when it granted for-cause removal protection to the Board of Governors of the Federal Reserve Board. H.R. Rep. No. 63-69, at 28 (1913); *see Federal Reserve Act*, ch. 6, § 10, 38 Stat. 260-61 (1913). Congress reaffirmed the Federal Reserve Board members’ for-cause removal protection (*Banking Act of 1935*, Pub. L. No. 74-305, § 203(b), 49 Stat. 704-05 (1935)) when it granted the Board authority to set interest rates (*Banking Act of 1933*, Pub. L. No. 73-66, § 8, 48 Stat. 168 (1933)).

In 1914, Congress provided for-cause removal protection to the commissioners of the FTC, which Congress charged with preventing “unfair

methods of competition in commerce.” *Federal Trade Commission Act*, ch. 311, § 5, 38 Stat. 719 (1914); *see id.* § 1, 38 Stat. 718. Congress provided the commissioners with for-cause removal protection to “ensur[e] ‘a continuous policy’ ‘free from the effect’ of ‘changing [White House] incumbency.’” *Seila*, 591 U.S. at 276 (Kagan, J., dissenting in part and concurring in part) (quoting 51 Cong. Rec. 10376 (1914)).

In 1934, in the midst of the Great Depression, Congress established two more multimember independent agencies with for-cause removal protections: the Securities and Exchange Commission² and the National Mediation Board (45 U.S.C. § 154). The next year, the Supreme Court expressly approved for-cause removal protections in *Humphrey’s Executor*.

B. For the Last Ninety Years, the Supreme Court Has Continuously Held that Congress May Enact For-Cause Removal Protections for Members of Independent Agency Boards and Commissions.

The Supreme Court has long recognized that Congress can create independent agencies run by multimember boards or commissions appointed by the President, whose members the President may remove only for good cause.

² Although the statute creating the Securities and Exchange Commission does not include explicit for-cause removal protections, the Supreme Court has accepted that the members of the Commission enjoy such protection. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) (noting that “[t]he parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office’”) (citation omitted)).

Soon after the Founding, the Supreme Court confirmed that Congress could enact removal protections. Writing for a unanimous Court in *Marbury v. Madison*, 5 U.S. 137, 162 (1803), Chief Justice John Marshall observed without objection that some officers were “not removable at the will of the executive.”

Chief Justice Marshall also explained the basis for Congress’s authority to structure governmental entities in *McCulloch v. Maryland*, 17 U.S. 316 (1819), approving Congress’s creation of the Second Bank of the United States and detailing the Framers’ intent through the Necessary and Proper Clause to grant Congress “discretion, with respect to the means by which the powers it confers are to be carried into execution” so that the legislature can perform its duties “in the manner most beneficial to the people.” *McCulloch*, 17 U.S. at 421. The Constitution thus embodies the recognition that prescribing how Congress should “execute its powers” would be “unwise” and deprive the legislature of the flexibility to respond to future “exigencies” that the Framers may have “seen dimly,” if at all. *Id.* at 415. The Framers relied on the flexibility granted to Congress to ensure the Constitution would “endure for ages to come” and “adapt[] to the various *crises* of human affairs.” *Id.* (emphasis in original).

In the midst of the Great Depression, the Supreme Court affirmed Congress’s then century-old practice of creating independent bodies whose members are not removable at will. Rejecting a challenge to Congress’s authority

to protect FTC commissioners from removal without cause, the Court held that Congress’s broad power to create multimember independent agencies includes the “power to fix the period during which [commissioners] shall continue [in office], and to forbid their removal except for cause in the meantime.” *Humphrey’s Executor*, 295 U.S. at 629.

The Court recognized the fundamental role of removal protection in effecting Congress’s intent “to create a body of experts” who (1) “gain experience by length of service,” (2) “shall be independent of executive authority,” and (3) remain “free to exercise [their] judgment without the leave or hindrance of any other official or any department of the government.” *Id.* at 625-26. Congress determined “that length and certainty of tenure would vitally contribute” to accomplishing these objectives. *Id.* at 626. And the Court declined to “thwart” Congress’s efforts to cement the FTC’s independence. *Id.*

Following *Humphrey’s Executor*, the Supreme Court repeatedly reaffirmed the constitutionality of removal protections for multimember independent agencies. *See, e.g., Wiener v. United States*, 357 U.S. 349 (1958) (applying *Humphrey’s Executor* to uphold the removal protections Congress gave to the War Claims Commission); *Morrison v. Olson*, 487 U.S. 654, 687-88 & n.28 (1988) (affirming that *Humphrey’s Executor* remained good law, even though “the powers of the FTC . . . would at the present time be considered ‘executive,’ at least to some

degree”); *Free Enter.*, 561 U.S. at 483 (declining to “reexamine” the precedent set in *Humphrey’s Executor* “that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will”); *Seila*, 591 U.S. at 218 (recognizing the exception to the President’s removal power established by *Humphrey’s Executor* “for multimember expert agencies that do not wield substantial executive power”); *Collins*, 594 U.S. at 250-51 (affirming that the Court did not revisit its prior decisions in *Seila*).

This precedent has rendered “uncontroversial” “the constitutionality of [multimember] independent agencies, whose officials possess some degree of removal protection that insulates them from unlimited and instantaneous political control.” *Leachco, Inc. v. Consumer Prod. Safety Comm’n*, 103 F.4th 748, 760 (10th Cir. 2024), *cert. denied*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025); *see also Meta Platforms, Inc. v. Fed. Trade Comm’n*, 723 F. Supp. 3d 64, 86-87 (D.D.C. 2024) (detailing the history of Supreme Court cases affirming *Humphrey’s Executor* and stating that “this Court lacks authority (or reason) to disregard the Supreme Court’s holding in *Humphrey’s Executor* that the for-cause removal restriction contained in the FTC Act passes constitutional muster”).

C. Congress Has Created Over Thirty Multimember Independent Agencies in Reliance on *Humphrey’s Executor*.

In the ninety years since *Humphrey’s Executor*, Congress has enacted bills, signed by the President, that have created over thirty agencies with multimember independent leadership boards and commissions protected from at-will removal by the President.

Two months after *Humphrey’s Executor*, Congress relied on the Supreme Court’s endorsement of the FTC’s structure to establish the NLRB (*see* Section II(A), *infra*). *National Labor Relations Act*, ch. 372, § 3, 49 Stat. 449, 451 (1935). Like the FTC, the NLRB has a five-member leadership board with staggered terms, minimizing instability and allowing for expertise to accrue. *See* 29 U.S.C. § 153(a). Congress intended the NLRB to exercise impartial judgment, as evidenced by its imbuing the agency with several traditional indicia of independence from presidential control. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 784 (2012-2013). Such indicia include specified five-year terms and for-cause removal protection, preventing the President from removing members for any cause except for “neglect of duty or malfeasance in office.” *See* 29 U.S.C. §§ 153(a), 155, 160; *see also Humphrey’s Executor*, 295 U.S. at 625-26 (describing the FTC’s independence). In this way, the NLRB, like the FTC,

“gain[ed] the ability to resist presidential influence from its enabling statute[.]”

Datla, 98 Cornell L. Rev. at 826.

Congress created the MSPB forty-three years later, using the same established authority. *Civil Service Reform Act of 1978*, Pub. L. No. 95-454, § 201, 92 Stat. 1111, 1119 (1978). By its statutory design, the MSPB is a multimember agency of three members, including a Chair appointed by the President and confirmed by the Senate (see 5 U.S.C. §§ 1201, 1203), with for-cause removal protection, expertise and partisan balance requirements (see *id.* § 1201), and authority to bypass review by the Office of Management and Budget by submitting budget and legislative recommendations to Congress (see *id.* § 1204(k)-(l)).

The Executive at the time not only agreed that Congress possessed authority to protect members of the MSPB from at-will removal but also encouraged Congress to *use* that authority. President Carter proposed that Congress create the MSPB, and he urged Congress to enact such removal protections to “guarantee independent and impartial protection to employees.” President Jimmy Carter, *Federal Civil Service Reform Message to Congress* (Mar. 2, 1978), <https://perma.cc/2URA-FJRR>.

The NLRB and the MSPB are only two of the over thirty agencies that Congress created in reliance on *Humphrey’s Executor* and its explicit authorization

of statutorily-created multimember agencies with removal protections to promote independence and expertise. As shown in the following table, listing multimember independent agencies that Congress created post-*Humphrey's Executor*, Congress has tasked independent agencies with addressing the spectrum of the nation's most significant crises and challenges over the course of the last ninety years.

Purpose	Independent Agencies
Tackling Public Safety Issues (Eight Agencies)	<ul style="list-style-type: none"> • 1967 – National Transportation Safety Board, 49 U.S.C. § 1111(c);³ • 1970 – Occupational Safety and Health Review Commission, 29 U.S.C. § 661(b); • 1972 – Consumer Product Safety Commission, 15 U.S.C. § 2053(a); • 1976 – National Advisory Council on National Health Service Corps, 42 U.S.C. §254j(b); • 1977 – Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823(b)(1)(B); • 1984 – United States Institute of Peace, 22 U.S.C. § 4605(f); • 1990 – Chemical Safety Board, 42 U.S.C. § 7412(r)(6); and • 1996 – Federal Aerospace Management Advisory Council (previously the Federal Aviation Management Advisory Council), 49 U.S.C. § 106(p)(6)(E).

³ The citations in the table reference the statutory for-cause removal protections enacted by Congress for each of these agencies.

Purpose	Independent Agencies
Addressing Civil Rights and Public Welfare Issues (Two Agencies)	<ul style="list-style-type: none"> <li data-bbox="528 276 1290 361">• 1957 – Commission on Civil Rights, 42 U.S.C. § 1975(e) and 42 U.S.C. § 1975a; and <li data-bbox="528 392 1274 477">• 1974 – Legal Services Corporation, 42 U.S.C. § 2996c(e).
Protecting Workers and Promoting Labor Rights (Five Agencies)	<ul style="list-style-type: none"> <li data-bbox="528 530 1111 572">• 1935 – NLRB, 29 U.S.C. § 153(a); <li data-bbox="528 604 1111 646">• 1978 – MSPB, 5 U.S.C. § 1202(d); <li data-bbox="528 677 1356 762">• 1978 – Federal Labor Relations Authority, 5 U.S.C. § 7104(b); <li data-bbox="528 794 1307 878">• 1980 – Foreign Service Labor Relations Board, 22 U.S.C. § 4106(e); and <li data-bbox="528 910 1356 994">• 1980 – Foreign Service Grievance Board, 22 U.S.C. § 4135(d).

Purpose	Independent Agencies
Supporting Commerce and Addressing Economic Issues (Seven Agencies)	<ul style="list-style-type: none"> • 1936 – United States Maritime Commission, <i>Merchant Marine Act of 1936</i>, Pub. L. 74-835, 49 Stat. 1985 (1936);⁴ • 1961 – Federal Maritime Commission, 46 U.S.C. § 46101(b)(5); • 1970 – Postal Service Board of Governors, 39 U.S.C. § 202(e)(3); • 1970 – Postal Regulatory Commission, 39 U.S.C. § 502(a); • 1988 – National Indian Gaming Commission, 25 U.S.C. § 2704(b)(6); • 1995 – Surface Transportation Board, 49 U.S.C. § 1301; and • 2009 – Corporation for Travel Promotion, 22 U.S.C. § 2131(b)(2)(D); (b)(3).
Promoting Justice and the Legal System (Three Agencies)	<ul style="list-style-type: none"> • 1984 – United States Sentencing Commission, 28 U.S.C. § 991; • 1984 – State Justice Institute, 42 U.S.C. § 10703(h); and • 2006 – General Services Administration: Civilian Board of Contract Appeals, 41 U.S.C. § 7105(b)(3).

⁴ The Federal Maritime Commission replaced the United States Maritime Commission in 1961.

Purpose	Independent Agencies
Tackling Energy and Environmental Issues (Four Agencies)	<ul style="list-style-type: none"> • 1946, Atomic Energy Commission, <i>Atomic Energy Act of 1946</i>, Pub. L. No. 585, 60 Stat. 755, 756-757 (1946);⁵ • 1974 – Nuclear Regulatory Commission, 42 U.S.C. § 5841; • 1976 – Regional Fishery Management Councils, 16 U.S.C. § 1852(b)(6); and • 1977 – Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b)(1).
Addressing Issues Facing Members of the Military and Victims of War (Three Agencies)	<ul style="list-style-type: none"> • 1948 – War Claims Commission, <i>War Claims Act of 1948</i>, Pub. L. 80-896, 62 Stat. 1240 (1948);⁶ • 2000 – Department of Defense: Medicare-Eligible Retiree Health Care Board of Actuaries, 10 U.S.C. § 1114(a)(2)(A); and • 2008 – Department of Defense: Board of Actuaries, 10 U.S.C. § 183(b)(3).

The above table illustrates Congress's wide-ranging and longstanding reliance on *Humphrey's Executor*. Congress has repeatedly exercised its legislative power, with the flexibility the Framers intended, to create multimember independent agencies to address the full range of problems facing the nation.

⁵ The Energy Research and Development Administration and the Nuclear Regulatory Commission replaced the Atomic Energy Commission in 1974.

⁶ The War Claims Commission was a temporary agency that dissolved in 1954. See *Wiener*, 357 U.S. at 351.

Furthermore, Congress structured these agencies with the intention that their boards or commissions would exercise the agency’s powers with a measure of independence based on the authority to create for-cause removal exercised by the legislature since the Founding and the modern model approved by the Supreme Court in *Humphrey’s Executor*.

D. Precedent and Practice Support the Tradition of Multimember Independent Agencies Affirmed by *Humphrey’s Executor*.

There is no basis for disturbing the established precedent and longstanding practice undergirding Congress’s authority to create multimember independent agencies with removal protections, which include not only the NLRB and MSPB, but also the Federal Reserve Board, the FTC, the Securities and Exchange Commission, and the National Mediation Board (all founded before *Humphrey’s Executor*), and the other agencies outlined in Section I(C), *supra*.

Stare decisis has “special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.’” *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (citation omitted). Congress, the Executive, and the Judiciary have developed settled norms and understandings based on the multimember agency structure approved by *Humphrey’s Executor*. Overruling that practice and precedent would upend those understandings and disrupt a century and half of

legislation reflecting Congress's considered judgment on how to structure the nation's government.

Appellants urge the Court to repudiate precedent and hold that all boards and commissions of independent agencies must be removable by the President at will. Nothing in the Constitution supports this radical proposal. Nothing in continued congressional practice countenances it. And nothing in Supreme Court precedent requires it.

II. The Independence of the NLRB and MSPB Play a Critical Role in Each Agency's Ability to Fulfill Its Congressional Mandate.

The NLRB and MSPB both require independence to deliver on their respective missions. The NLRB's independence ensures its ability to fairly and impartially resolve labor disputes and promotes public confidence in those decisions. And the MSPB's independence reduces potential conflicts of interest in the Executive Branch and enables the MSPB to avoid politicization while fulfilling its mission to impartially adjudicate federal employment matters and protect the rights of whistleblowers.

A. The NLRB's Independence Furthered Its Mission of Impartial Resolution of Labor Disputes.

The text of the National Labor Relations Act and its legislative history make clear Congress's intent to safeguard the NLRB's independence by granting its

members removal protections to ensure public confidence in the fairness of the NLRB’s resolution of labor disputes.

As noted by supporters and critics alike, the legislative history of the National Labor Relations Act is “overwhelmingly clear” that the Board’s members were expected to be “impartial” and “strictly nonpartisan.” Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163 (2013).⁷ For instance, Members of Congress emphasized the importance of the NLRB’s independence from the Executive Branch during committee debates, arguing that the NLRB’s independence from the Department of Labor was necessary “if the public is to have confidence in the impartiality of this Board” to ensure fairness in the resolution of labor disputes. 79 Cong. Rec. 9725 (1935).

Further, House Members explicitly voiced their intent to structure the NLRB and its removal protections consistent with the Supreme Court’s recent decisions in *Humphrey’s Executor, Myers v. United States*, 272 U.S. 52 (1926), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Congressional Record includes several pages of debate regarding the implications of these precedents for Congress’s creation of the NLRB. 79 Cong. Rec. 9678-82, 9722-

⁷ See also, Walker J. Gray, “*Dependent*” *Independent Agencies: How Humphrey’s Executor Envisioned Independent Agencies and the NLRB’s Inconsistency with This Vision*, 53 Colum. L. Rev. 77 (2022-2023).

25, 10298 (1935). For example, Representative Vito Marcantonio of New York emphasized the distinction the Court drew in *Myers* and *Humphrey's Executor* between executive officers under the President's purview and agencies engaging in quasi-judicial and quasi-legislative functions. *Id.* 9724-25. He sought to ensure that the President would not have “unrestrained” removal power over members of the Board, which would be “contrary to the intent of Congress.” *Id.* 9725. Similarly, a House amendment clarified that “[t]he Board as contemplated by the bill is in no sense to be an agency of the executive branch” but rather is “to have a status similar to that of the [FTC], which as the Supreme Court pointed out in the *Schechter* case, is a quasi-judicial and quasi-legislative body.” *Id.* 10298 (italics added).

B. The MSPB’s Independence Furthers Its Mission of Protecting Federal Employees.

Congress likewise intended the MSPB to be an independent agency that preserves the professional, non-partisan, merit-based federal workforce and defends the rights of federal workers and whistleblowers by providing an impartial forum for adjudicating employment disputes. Prior to creation of the MSPB, the Civil Service Commission performed both the adjudication and prosecution of federal employment-related disputes. President Carter prepared the *Reorganization Plan No. 2 of 1978* to urge Congress to create legislation authorizing agencies to reform the civil service to more effectively protect federal

employees' rights, recognizing that "the Civil Service Commission" had acquired "inherently conflicting responsibilities: to help manage the Federal Government and to protect the rights of Federal employees." 43 F.R. 36037, 92 Stat. 3783 (1978). In an attempt to mitigate this conflict, President Carter proposed the creation of the MSPB, the Office of Personnel Management, and the Federal Labor Relations Authority as three new independent agencies, as well as the Office of Special Counsel as an independent prosecutor of cases before the MSPB.⁸ *Id.* According to the Reorganization Plan, the MSPB "would be the first independent and institutionally impartial Federal agency solely for the protection of Federal employees." *Id.*

Congress codified the President's proposal in the Civil Service Reform Act of 1978 ("CSRA"), which passed and became effective less than five months later. The stated policy of Congress in formally creating the MSPB as part of the Civil Service Reform Act was to ensure that federal employees "receive appropriate protection through increasing the authority and powers of the [MSPB] in processing hearings and appeals affecting Federal employees[.]" *Civil Service Reform Act of 1978*, Pub. L. No. 95-454, 92 Stat. 1111, § 3(3) (1978).

⁸ See U.S. Merit System Protection Board, *About MSPB* (last visited Apr. 3, 2025), <https://www.mspb.gov/about/about.htm>.

As noted by commentators, “the MSPB is intended to be an independent adjudicatory body, and politicizing it would create its own problems both for civil service in general and [administrative law judges] in particular.” Richard E. Levy, *Restoring ALJ Independence*, 105 Minn. L. Rev. 39, 96 (2020-2021). Administrative law judges are among the federal personnel under the MSPB’s jurisdiction, and when an agency seeks to remove a judge or impose other disciplinary sanctions, the MSPB is tasked with determining whether good cause exists to take such action by virtue of a neutral hearing before the Board. *See 5 U.S.C. § 7521(a)*. Without safeguards to protect the impartiality of the MSPB, the independence of administrative law judges—a critical protection for the rule of law—would suffer. Levy, 105 Minn. L. Rev. at 45.

In sum, Congress structured both the NLRB and the MSPB as independent agencies to ensure they could effectively serve their respective missions of impartial dispute resolution. Without removal protections, neither agency can ensure that its Board has the freedom from executive overreach to protect employees’ rights as their enabling statutes require. *See 29 U.S.C. § 151; Civil Service Reform Act of 1978*, 92 Stat. 1111, § 3(3).

CONCLUSION

Amici now occupy the seats of the thousands of their predecessors who have crafted and approved the structure of independent agencies in this nation for the

past ninety years—in fact, since the Founding itself. They are particularly well situated to opine on the disruption of settled expectations and the affront to the separation of powers that Appellants’ arguments, if accepted, would entail.

For those reasons, and for the reasons stated above, *Amici* urge that this Court affirm the judgments of the District Courts.

Dated: April 9, 2025

Respectfully submitted,

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Executed this 9th day of April, 2025.

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